

Memorandum 2020-35

Emergency-Related Reforms: Common Interest Development Meetings

As part of its work on emergency-related reforms, the Commission¹ is considering whether the law should be revised to facilitate the use of teleconference meetings in common interest developments (CIDs) during an emergency.

This memorandum addresses that subject but only in the context of the Davis-Stirling Common Interest Development Act, which governs *residential* CIDs. It does not address the Commercial and Industrial Common Interest Development Act.² That statute does not regulate the conduct of board meetings; commercial and industrial CIDs are free to adopt their own rules to address emergency procedures.

Unless otherwise indicated, all statutory references in this memorandum are to the Civil Code.

INTRODUCTION

This study was inspired by the Commission's own experience holding meetings during the pandemic.

With a stay-at-home order in place, it was not possible to hold an in-person meeting. The obvious alternative was to meet by teleconference, using techniques that would produce good deliberations while preserving the public's right to observe and participate.

Fortunately, readily available software makes that feasible.

The only obstacle was a legal one. Under the Bagley-Keene Open Meeting Act, a state body can only use teleconferencing for a public meeting if each

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Sections 6500-6876.

member of the state body who participates by teleconference is physically present at a location that is noticed and held open for attendance by the public.³ That requirement prevents a state body from holding a meeting entirely by teleconference.

The staff raised that issue with the Governor's office and asked for relaxation of the rule. The Governor later issued Executive Orders N-25-20 and N-29-20, which, among other things, suspended the physical location requirement described above. That removed the legal obstacle and the Commission has since been holding its meetings entirely by teleconference.

It occurred to the staff that a similar issue might exist for meetings of CIDs. There are over 40,000 CIDs in California, all of which are governed by boards that are required to hold regular meetings that must be open to attendance by their membership. CIDs may also hold meetings of their full membership.

Existing law regulates the use of teleconferencing in conducting CID board meetings. The rules, which were obviously modeled on the state and local open meeting acts, include a specific requirement that at least one board member be physically present in a noticed location that is held open for attendance by members.

Section 4090 provides (with emphasis added):

"Board meeting" means either of the following:

(a) A congregation, at the same time and place, of a sufficient number of directors to establish a quorum of the board, to hear, discuss, or deliberate upon any item of business that is within the authority of the board.

(b) A teleconference, where a sufficient number of directors to establish a quorum of the board, in different locations, are connected by electronic means, through audio or video, or both. A teleconference meeting shall be conducted in a manner that protects the rights of members of the association and otherwise complies with the requirements of this act. Except for a meeting that will be held solely in executive session, *the notice of the teleconference meeting shall identify at least one physical location so that members of the association may attend, and at least one director or a person designated by the board shall be present at that location.* Participation by directors in a teleconference meeting constitutes presence at that meeting as long as all directors participating are able to hear one another, as well as members of the association speaking on matters before the board.

3. Gov't Code § 11123(b)(1)(F).

At a minimum, this study should address the italicized language, which currently presents a legal obstacle to holding a CID board meeting entirely by teleconference.

In addressing the issue of teleconferencing in CID meetings, the Commission could decide to adopt a narrow reform or a broad reform:

- A narrow reform would be limited to changing the law to address the use of teleconferencing during an emergency.
- A broad reform would go beyond revisions needed to address an emergency.

NARROW REFORMS

A narrow reform must achieve two ends. It must remove the requirement that a teleconference meeting have a physical location and make adjustments to ensure that teleconference participants have the same rights that they would have if the meeting were held in person.

The staff proposes that these reforms be expressed in a separate section, rather than by amending existing Section 4090. As a general practice it is bad idea to place substantive rules within a definition (as would be done if Section 4090 were amended to address the issues discussed here). Moreover, a separate section addressing emergency practices could serve as an anchor point if further emergency-related reforms are needed in the future.

With all of that in mind, the staff recommends that the following new article be added, in existing Chapter 6 (commencing with Section 4800), which is entitled "Association Governance":

ARTICLE 11. EMERGENCY POWERS AND PROCEDURES

5450. (a) This section only applies to a common interest development that is in an area affected by one or more of the following conditions:

(1) A state of emergency proclaimed under Section 8625 of the Government Code

(2) A local emergency proclaimed under Section 8630 of the Government Code.

(3) A state of disaster or emergency declared by the federal government.

(b) Notwithstanding subdivision (b) of Section 4090, any other law, or the association's governing documents, a board meeting or meeting of the members may be conducted entirely by teleconference, without any physical location being held open for

the attendance of any director or member, if all of the following conditions are satisfied:

(1) The meeting notice provides clear technical instructions on how to participate by teleconference.

(2) The meeting notice provides the telephone number and electronic mail address of a person who can provide technical assistance with the teleconference process, both before and during the meeting.

(3) The meeting notice is delivered by a method other than posting a printed copy of the notice.

(4) Every director and member has the same ability to observe and participate in the meeting that would exist if the meeting were held in person.

(5) Any vote shall be conducted in a way that makes clear how each person entitled to vote has voted. Unanimous consent and acclamation are sufficient for this purpose.

(6) Any person who is entitled to participate in the meeting shall be given the option of participating by telephone.

Comment. Section 5450 is new.

Subdivision (a) governs the application of the section. See also 42 U.S.C. §§ 247d (federal public health emergency), 5120-5208 (federal disaster relief).

Subdivision (b) authorizes meetings to be conducted entirely by teleconference, if certain conditions are met.

The elements of that proposed provision are discussed below.

Application of the Proposed Law

Subdivision (a) would establish that the section only applies during a declared emergency or disaster. Paragraphs (1) and (2) refer to the provisions that govern a formal state or local government proclamation of emergency. Paragraph (3) refers to a federal declaration but does not cite specific authority for such a declaration. The staff found two relevant federal statutes, but is not sure whether there might be others. To avoid any implication of limitation, paragraph (3) is left general and the two statutes are mentioned only in the Comment.

The staff invites comment on whether there are other authorities that should be cited, either in the proposed law or the Comment.

Subdivision (a) makes clear that the section overrides any contrary provision of law or the association's own governing documents. The latter point is important, because associations are also bound by their own declarations,

bylaws, operating rules, and other governing documents. A rule in such a document could also be an obstacle to teleconferencing.

Contents of the Meeting Notice

One of the concerns raised earlier in this study was that notice of a meeting held by teleconference must include clear instructions on how to participate. **The staff agrees.** Teleconferencing is new to many people. Some CID residents may lack sophisticated familiarity with computers, which could make it difficult or daunting to participate.

To further ease that concern, proposed paragraph (b)(2) would require that the meeting notice identify a person who can provide technical support, both before and during the meeting. This goes beyond any suggestion that commenters have made to date; it is the staff's idea. We know from our own experience that technical glitches are inevitable. Providing a point of contact for resolving them probably makes sense.

That would impose a burden on associations, but the staff believes it would be manageable. **Should such a requirement be included in the proposed law?**

Delivery of the Meeting Notice

Under existing law, notice of a board meeting may be given by "general delivery."⁴ Permissible methods of general delivery include: "Posting the printed document in a prominent location that is accessible to all members, if the location has been designated for the posting of general notices...."⁵

Some commenters have objected to the use of posting as a means of delivering notice of a teleconference meeting conducted under emergency procedures. In an emergency, the association's regular notice board may be inaccessible.

For that reason, proposed paragraph (b)(3) would prohibit the use of posting as a means of delivery. **Should the proposed law include such a provision?**

Adequacy of Participation

As a general matter, the use of teleconferencing to conduct a meeting should not prejudice any director or member of the association. Their existing rights to observe the progress of the meeting and to participate should not be curtailed.

4. Section 4920(c).

5. Section 4045(a)(3).

Proposed paragraph (b)(4) is a general expression of that principle. The staff left it general, rather than trying to enumerate the rights at issue, to avoid any implied limitation and to leave the provision flexible enough to adapt to any future changes in the law. **Should such a provision be included in the proposed law?**

Voting

At an in-person meeting, it should be clear how each person who is entitled to vote on a matter has voted. The same should be true in a teleconference meeting. The Bagley-Keene Open Meeting Act addresses that issue in a fairly strict way, providing that “All votes taken during a teleconferenced meeting shall be by rollcall.”⁶

The staff proposes a slightly relaxed approach. Conducting a formal rollcall vote could be onerous, especially if it is a vote of the full membership.

That is why proposed paragraph (b)(5) includes language that expressly recognizes the option of voting by unanimous consent or by acclamation. **Should such a provision be included in the proposed law?**

Telephone Access

Both the staff and commenters have proposed that the law require the option of attending a teleconference meeting by telephone, rather than by use of a computer. Although computer use is widespread, there are still those who lack the resources or knowledge to participate in a teleconference by using a computer. That should not be a bar to participation.

This should not be an onerous requirement. The teleconference software used by the Commission has a built in option for telephone participation at no cost and with little added administrative complexity.

The staff recommends that this provision be included in the proposed law.

BROADER REFORMS

As noted, some commenters have suggested reforms that go beyond what is needed to respond to an emergency.

This study was launched as part of the Commission’s overall efforts to develop proposals that would help California deal with the present pandemic.

6. Gov’t Code § 11123(b)(D).

The idea was to identify clearly beneficial emergency-related reforms that would be relatively easy for an already burdened Legislature to consider and enact.

For the foreseeable future, it seems likely that the Legislature will concentrate its efforts on pandemic-related problems. It may be reluctant to look beyond that subject matter to more routine matters, especially if a proposal is controversial and time-consuming.

For those reasons, the staff recommends that this study be limited to reforms that are needed to address an emergency. That recommendation does not reflect a judgment on the merits of the non-emergency proposals that have been made. It is based on practical concerns about maintaining the focus of the present work.

In case the Commission does not agree with the staff's recommendation, the proposed broader reforms are described below.

Remove the Emergency Requirement

Commenters have suggested that any improvements to the teleconference rules be made applicable generally, rather than limiting them to emergencies. In other words, instead of temporarily relaxing the requirements of existing law in an emergency, these commenters advocate a direct reversal of the existing policy that teleconferencing only be permitted if at least one physical location is held open for attendance by members.

A waiver of the physical location requirement makes obvious sense if there is an emergency that would make it unsafe to hold an in-person meeting. However, the benefit of such a waiver is less clear when in-person meetings are possible. In that situation, the physical location requirement guarantees the participation rights of persons who are reluctant to participate in a teleconference.

How would the Commission like to proceed on this issue?

Distribution of Materials Considered at Meetings

The Commission received a comment suggesting that any materials that the board considers at a meeting also be made available to the membership.

The Bagley-Keene Open Meeting Act includes a similar requirement:

Writings ... that are distributed to members of the state body prior to or during a meeting, pertaining to any item to be considered during the meeting, shall be made available for public inspection at the meeting if prepared by the state body or a member

of the state body, or after the meeting if prepared by some other person....⁷

If such a requirement were added to CID law, it would be a significant substantive change, unrelated to emergency response.

How would the Commission like to proceed on this issue?

Posting Meeting Recordings

Finally, we have received a suggestion that meetings conducted by teleconference should be video-recorded and the recordings should be posted to make them accessible to all members. As was correctly noted, readily available teleconference software has built-in recording features and the Commission has been recording its meeting and posting them to YouTube.

The process of recording meetings and posting them is not entirely cost-free. There is a monthly charge for the cloud storage space that the Commission's teleconference provider uses when recording meetings. It was also somewhat difficult puzzling out how to upload and organize the videos.

There is no existing requirement that CID meetings be recorded, with the recordings made available to the members. If such a requirement were added to CID law, it would be a significant substantive change, unrelated to emergencies.

The proposal would also be controversial. The Commission has already received comments opposing the proposed recording requirement.

How would the Commission like to proceed on this issue?

Respectfully submitted,

Brian Hebert
Executive Director

7. Gov't Code § 11125.1(b).